

TOWN OF KITTERY, MAINE  
BOARD OF APPEALS

APPROVED  
May 13, 2015

Members present: Brett Costa, Craig Wilson, Niles Pinkham, Jeffery Brake, Gary Beers

Members absent: Brian Boyle

Staff: Robert Marchi, Code Enforcement Officer

Chairman Costa called the meeting to order at 7:05 p.m.

1. Call to Order, Introductory, Roll Call
2. Pledge of Allegiance
3. Agenda Amendment and Adoption

Chairman Costa adopted the agenda as presented.

4. Executive session - NONE

5. Public Hearings:

Mr. Wilson noted Title 16.1.5.2.F.2 authorizes the Board of Appeals to hear the following Administrative Appeal.

ITEM 1: Harrison E. Lemont Management Co., Inc., Map 50, Lot 8, 435 U.S. Route# 1, Mixed Use zone (MU) - Requesting Administrative Appeal, per Title 16, Section 6.4.1, to replace two existing freestanding signs with one freestanding sign.

**Applicant's Case First**

Applicant, Mr. Kenneth Lemont, Harrison E. Lemont Management Co., Inc., provided the Board a brief overview of his efforts to get the two present signs replaced, going back to December 2013. He talked about his January 2014 application and meeting with the Town staff addressing various minor issues, with the result being a denial on May 15, 2014, identifying two issues to be worked on: 1) LED lighting; 2) Two signs where one is allowed.

He noted that LED lighting for signs was approved by the Town Council in December 2014. He resubmitted the application for one sign and spoke of a meeting with the Town Planner, Code Enforcement officer, Assistant Code Enforcement Officer, Mr. Keith Lemont, Mr. Ed Pennell, and himself. He stated that at the conclusion of the meeting he asked the Town Planner when he would get his sign. He said that the Planner indicated "within a few days". He stated that the only issue holding things up was the specs for LED lighting.

He indicated that Mr. Pennell had provided the specs to the Town on March 12<sup>th</sup>; and, after some time not having heard he contacted the office. He then received a second letter of denial on March 30, 2015 identifying several new issues.

That letter indicated two issues: 1) the point raised that Federal law requires gas prices be displayed; 2) the sign area was greater than 150 square feet.

Mr. Lemont reflected that the 150sf for signs is an extremely gray area and one only has to look down Route 1 to see numerous signs which exceed that. He presented several photos showing examples. He expressed frustration with what he had experienced and believed the proposed sign is legal.

## **Testimony**

Chairman Costa invited anyone present who wished to speak for, against, or about the Appeal

Mr. Ed Pennell, HA Mapes, Inc., Sunoco distributor for Mr. Lemont, described the proposed sign dimensions and lighting. He stated that the sign would cost upwards of \$20,000 and they didn't want any mistakes of compliance with that cost. He spoke of the LED lighting issue being resolved by the Town and the LED variable brightness and that they were required to display the pricing per Federal law.

He addressed the code requirement of so much footage per side. The Town wanted 75 feet per side face. He stated that the largest individual sign "face" to be used was 32sf, and felt the proposal complied with the code.

There was no further testimony.

The CEO provided:

Mr. Marchi expressed that the decision letter expressed clearly the sign area issue. He queried whether the hearing was to decide the administrative appeal or look at it now as a nonconformance miscellaneous variation request. He expressed that the understanding in the code department was that all new signage should be brought up to code.

## **Point of Order**

Mr. Beers raised a Point of Order, asking whether this Administrative Decision Appeal should more properly be a Miscellaneous Variation Request and/or what effect if any do nonconformance requirements of Title 16 bring to bear.

He noted the Board authorities, as outlined in the Board memo, dated May 05, 2015, in Title 16, Sections 16.1.5.2F4b and 16.6.4.3 regarding Sign Violation and Appeal. He stated that those passages reflect a typographical error in referring to Section 16.8.10.3 where it should refer to 16.8.10.13, as he had been advised by the Code Enforcement Officer that day.

He said that none of the provisions in Section 16.8.10.3 gave the Board authority to consider this appeal under the provisions of a Miscellaneous Variation Request.

He went on to state that Sections 16.7.3.5.4 Nonconforming Structure Relocation, and 16.7.3.5.5 Nonconforming Structure Repair and/or Expansion do appear to do so (subset here for reference):

### ***16.7.3.5.4 Nonconforming Structure Relocation.***

*A. A nonconforming structure may be relocated within the boundaries of the parcel on which the structure is located provided the site of relocation conforms to all dimensional requirements to the greatest practical extent as determined by the Board of Appeals or ..... and ..... In no case may the relocation of a structure be permitted that causes the structure to be more nonconforming. ....*

**16.7.3.5.5 Nonconforming Structure Repair and/or Expansion.** (Ordained 9-26-11; Effective 6-28-11) *A. A nonconforming structure may be repaired or maintained and may be expanded in conformity with the dimensional requirements, such as setback, height, etc., as contained in this Code. If the proposed expansion of a nonconforming structure cannot meet the dimensional requirements of this Code, the Board of Appeals ..... will review such expansion application and may approve proposed changes provided the changes are no more nonconforming than the existing condition and the Board of Appeals ..... makes its decision per section 16.6.6.2.*

He stated that the applicant had two existing two-sided signs with a total sign area of 285sf where the proposal was for one two-sided sign at 227.5sf which made that sign conforming in being one sign and less nonconforming in area. He said that the Code Enforcement Officer and Town Planner had viewed the proposal as a new sign which must be conforming in all respects and had denied the permit as a result.

Mr. Wilson stated that the Board had allowed a revision to a Miscellaneous Variation Request in the past from an accessory dwelling unit to an intra-family dwelling unit at the applicant's request. He indicated that the present appeal was a denial of a permit and the applicant had brought an Administrative Decision Appeal. He felt that the Appeal should be heard as presented unless the applicant chose to withdraw and file a different request.

Mr. Beers said that he was content with hearing the Administrative Appeal, but continued that there were two points to consider. First, that should the Board overturn the decision in favor of the nonconformance, given the same circumstances in the future, the staff could view new signs differently; and, should the Board reverse the decision that distinction between new signs and consideration for nonconforming would be a finding of fact.

He went on to say that, if the Board reversed the decision, it must be a determination that the Code Enforcement Officer and Planner made an error in their decision and overturning their interpretation based on nonconformance would serve to clarify which code sections carried the greater weight.

Mr. Wilson stated that he believed the Appeal should be heard and presented and go down the path of nonconformance during the review.

Mr. Costa noted the provisions of Section 16.8.10.12 and that there had been no notice of violation. He concurred with Mr. Wilson and so ruled.

Mr. Lemont came to the podium and stated that the appeal had been filed by his wife at the direction of the town staff.

### **Deliberations**

Mr. Costa raised a question from the ordinance about sign area being 150sf. In his view the area of a sign was the area and that two sides did not double the area. Mr. Wilson noted that Section 16.2.2 definition stated: *"Each face of a sign is considered a separate sign for area computations, but supporting brackets and posts are not included."* He said that he believed the applicant loses on that question, but that the way the applicant framed the appeal, combining two nonconforming signs into one with a less nonconforming area that he would support overturning the decision and granting the appeal.

Mr. Beers addressed other prospective issues shown in the Board Memo, concluding as follows:

Is the area of the proposed freestanding sign greater than 150 square feet?

The application shows 113.75sf for one side for a total of 227.5sf sign area for both sides, which agrees with staff.

Is the portion of the proposed sign that includes gas pricing a message board excluded from the definition of sign area?

Reviewing the Section 16.2.2 definitions of sign, sign area, and sign, changeable message, it is clear that the gas pricing portion of the proposed sign is not excluded which agrees with staff.

Does Title 16.8.10.9, Signs Allowed without a Sign Permit, include message boards or displays related to pricing?

Subsection N, Legally Required Signs, exempts “Any sign required by local, state or federal law with sign area no greater than two square feet or the minimum size required by law, whichever is larger;” A review of 10 MRS §1661-B. Requirement for gasoline stations to post prices of fuels sold; and 01-001 Department of Agriculture, Conservation and Forestry, Division of Inspections, Chapter 308: Roadside Advertising of Gasoline and Gasoline Pricing, reveals that, while where roadside fuel signs exist, certain display criteria are established, none of the provisions actually require a roadside sign to be in place for gas sellers sides, which agrees with staff.

Is no restriction on the gas pricing size of a sign inconsistent with Section 16.8.10.1B?

Mr. Beers requested a response from the Code Enforcement Officer as to how staff made this conclusion with the Section’s purpose to, “*balance the need for adequate identification and advertising for land uses to promote the economic well-being of the Town with the need to protect the public safety and maintain and enhance the physical appearance of the community.*”, in the context of: “*B. Establishing the appropriate bounds for location, size, number, type and use of signs to protect traffic safety, preserve property values and to promote visual order and clarity;*”(emphasis added)

Mr. Wilson concluded the discussion by saying that with no restriction on size signs could be huge as is often seen during gas wars. Mr. Beers agreed that that was a very cogent point and said he believed the point agreeing with staff was made.

Mr. Wilson queried whether the distance from Route 1 was nonconforming. Mr. Beer replied that he had measured it during his site visit and the present signs were 20 feet from the pavement as required. Mr. Wilson confirmed with the applicant that the proposed sign would also be at the conforming 20 feet.

Mr. Wilson stated that the proposed sign would be conforming as to location and height and confirmed with the applicant that the nonconforming size of the sign area would be 227.5sf.

***Mr. Beers moved to grant the Administrative Decision Appeal to Harrison E. Lemont Management Company, Incorporated, Map 50, Lot 8, 435 US Route 1, Mixed Use zone (MU), per Title 16, Section 6.4.1, to replace two existing freestanding signs with one freestanding sign in accordance with Title 16, Sections 16.7.3.5.4 and 16.7.3.5.5, reversing the Code Enforcement Officer / Town Planner denial of a sign permit dated 03/30/15.***

**Mr. Pinkham seconded. Motion carried unanimously**

### **Findings of Fact**

1. Under Board authority in Sections 16.1.5.2, Powers and Duties; and, 16.6.4.3, Miscellaneous Variation Request, no provision of Section 16.8.10.13, Sign Violation and Appeal, applies to this Appeal allowing Miscellaneous Variations.
2. The proposed replacement sign is less nonconforming than the two existing.
3. The area of the proposed freestanding sign is greater than 150 square feet (one two-sided at 227.5 square).
4. The portion of the proposed sign that includes gas pricing is a message board and is not excluded from the definition of sign area as shown in Section 16.2.2, Definitions.
5. Section 16.8.10.9, Signs Allowed without a Sign Permit, Subsection N, Legally-Required Signs does not include message boards or displays related to gas pricing.
6. A restriction on the gas pricing size of a sign is consistent with Section 16.8.10.1B, Purpose.
7. The Board's decision was made in accordance with the provisions of Sections 16.6.6.1, Conditions; and, 16.6.6.2, Factors for Consideration with no issues identified.
8. The CEO/Planner Administrative Decision is reversed and the Appeal is granted.

**Mr. Beers moved to accept the Findings of Fact as read. Mr. Wilson seconded. Motion carried unanimously**

### **Conclusion(s)**

The Board determined that the Code Enforcement Officer / Town Planner viewed the application as a new sign permit which must meet all conformity standards and did not consider provisions in Title 16 for reconstruction and/or relocation of nonconforming structures.

The Board determined that replacement of the two existing two-sided nonconforming signs at approximately 285 square feet, with one two-sided sign at 227.5 square feet, conforming in height and location criteria, was less nonconforming.

The Board of Appeals has the authority to grant an Administrative Decision Appeal, reversing a Code Enforcement Officer / Town Planner decision under Title 16, Section 16.1.5.2, and pursuant to Sections 16.7.3.5.4 and 16.7.3.5.5, to approve reconstruction and relocation of nonconforming structures that are no more than an existing non-conformity:

*Section 16.7.3.5.4, "...relocation conforms to all dimensional requirements to the greatest practical extent as determined by the Board of Appeals..."; and 16.7.3.5.5, "...may approve proposed changes provided the changes are no more nonconforming than the existing condition...."*

**Mr. Beers moved to accept the Conclusions as read. Mr. Pinkham seconded. Motion carried unanimously**

Mr. Costa noted that the approval is not the granting of a building permit, and any aggrieved party may appeal this decision to Superior Court within 45 days.

6. Unfinished Business - NONE

7. New Business:

a. Board Bylaws Amendment Proposal

Mr. Beers noted that the proposed revision of the Board's By-Laws for three minor revision clarifications as suggested by Councilor Dennett had been presented at the last regular meeting, and was before the Board for the second time in accordance with Bylaws Section 13.

**Mr. Beers moved approval of the proposed ByLaw revisions as presented. Seconded by Mr. Wilson. With five like votes the motion carried unanimously.**

8. Acceptance of Previous Minutes:

The minutes of March 24, 2015 were not available.

The minutes of April 28, 2015 were accepted as presented.

9. Board Member or CEO Issues or Comment - NONE

10. Adjournment:

**Mr. Beers moved to adjourn. Seconded by Mr. Wilson. Motion carried unanimously.**

The Board of Appeals meeting of May 13, 2015 adjourned at 8:19 p.m.

Following the meeting, the Board conducted a workshop concluding at 8:50pm